Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-867
IN THE

# Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

*Petitioner,*

*vs.*

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent.*

## BRIEF OF THE HONORABLE MERVYN M. DYMALLY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

EDWARD L. MASRY,
15495 Ventura Blvd.,
Sherman Oaks, Calif. 91403,
(213) 872-2150,
*Counsel of Record for Amicus.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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### Interest of Amicus.

The amicus, the Honorable Mervyn M. Dymally, member of the U.S. House of Representatives and representing the Thirty-first Congressional District, has received the consent of the parties to the case to the filing of this brief amicus curiae, and copies of letters containing that consent are filed with the Clerk of the Court.

Overturning 200 years of law preserving the separation of church and state, the decision of D.C. Circuit affirming the final order of the Federal Communications Commission would make unlimited supervision by the FCC of churches and their finances and unlimited disclosure to the FCC of individual donation records, including donation amounts,

the price of receiving religious contributions to a church ministry that broadcasts.

My fear is that such compelled disclosure would violate the sacred commitments and constitutional rights, both religious and associational, of the First Amendment, and the right of privacy guaranteed by other amendments. My belief is that the Supreme Court, and not an administrative agency, should resolve the relevant issues, including the limits of government encroachments upon the rights of churches to protect their congregations and contributors rights to anonymous giving as a part of their religious belief, particularly in light of *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the amicus. For, if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the amicus put this brief before the Court.

**Statement of the Case.**

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC

discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from government intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a con-

sequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were

segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application*. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

## REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church —that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

### I.

### Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 2, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party), *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g., Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g., Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf., e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo, supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranted by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n. 1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due proces' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

**Conclusion.**

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

EDWARD L. MASRY,

*Counsel of Record for Amicus.*